

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
November 13, 2008 Session

RHEAETTA F. WILSON, ET AL. v. AMERICARE SYSTEMS, INC., ET AL.

**Appeal from the Circuit Court for Bedford County
No. 10204 Lee Russell, Circuit Judge**

No. M2008-00419-COA-R3-CV - Filed March 31, 2009

This appeal involves the enforceability of an arbitration clause in a nursing home's admission contract. At the time of the admission of the resident, Mable Frances Farrar, into the nursing home, one of her daughters signed an admission contract containing an arbitration clause. After Ms. Farrar's death, her daughters filed suit in the Circuit Court for Bedford County against the owner of the nursing home, the corporation that operated it and two individuals who were employed in the nursing home and involved in providing care to Ms. Farrar. The defendants moved to compel arbitration in accordance with the admission contract, but later withdrew that motion. The motion to compel arbitration was renewed more than three years after suit had been filed and the case was set for trial. The trial court declined to compel arbitration after concluding that the defendants had waived the arbitration agreement and that defendants had failed to establish sufficient evidence to entitle them to its enforcement. Defendants have appealed. We have determined that the trial court's finding that defendants failed to establish they were entitled to enforcement of the agreement was correct and affirm the judgment of the trial court. Because we find a lack of evidentiary support for the finding that defendants had waived their rights under the arbitration agreement, we vacate that portion of the trial court's order and remand to case for an evidentiary hearing should that issue again become relevant.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed as
Modified**

DONALD P. HARRIS, SR. J., delivered the opinion of the court, in which PATRICIA J. COTTRELL, P. J., M.S., and RICHARD H. DINKINS, J., joined.

Thomas Pinckney, Susan D. Bass, Nashville, Tennessee, for appellants, Americare Systems, Inc., Shelbyville Residential, LLC, Dottie Hunt and Mary Ann Steelman.

C. J. Gideon, Nashville, Tennessee, and Raymond W. Fraley, Jr., Fayetteville, Tennessee, for appellees, Rheaetta Wilson and Lauralyn F. Watson.

OPINION

FACTUAL AND PROCEDURAL BACKGROUND

On October 13, 2003, Mable Frances Farrar, according to the complaint filed in this cause, was admitted to Celebration Way assisted living facility. Upon her admission, her daughter, Rheatta F. Wilson, signed a Residence and Service Agreement containing an arbitration agreement. This agreement was signed, "Mable P. Farrar by Rheatta F. Wilson." At the beginning of the next calendar year, Ms. Wilson signed a second Residence and Service Agreement also containing an arbitration agreement.¹ The second Residence and Service Agreement was dated January 1, 2004, and is signed "Rheatta F. Wilson for Mable Farrar." At the same time, Ms. Wilson signed a document captioned "Acknowledgement." This document was also signed "Rheatta F. Wilson for Mable Farrar." Below the signature, in a space preceded by "Print or type name and capacity" there appears, "Rheatta F. Wilson - daughter * power of attorney." On the same document, Ms. Wilson checked a space indicating she was the guardian for Ms. Farrar.

According to the complaint, in May 2004, Ms. Farrar began experiencing problems with constipation. She was examined by her treating physician, Dr. Alma Tamula, on May 27, 2004, and was diagnosed as impacted. The doctor ordered a course of treatment including the administration of four enemas per day, the use of suppositories and the taking of prescribed medications. The staff of Celebration Way represented to the plaintiffs that they would adhere to the treatment prescribed by Ms. Farrar's physician. On May 28, 2004, the staff represented to plaintiffs and a nurse employed by Dr. Tamula that Ms. Farrar was receiving the prescribed treatment and that Ms. Farrar's condition had improved. The complaint alleges these representations were false. On May 29, 2004, the plaintiffs were first advised that Ms. Farrar had not received the enemas as prescribed. Ms. Farrar died that same day after being transferred to the Bedford County Medical Center. The cause of death was the perforation of a bowel caused by long-standing constipation.

On October 29, 2004, Ms. Wilson and her sister, Lauralyn F. Watson, filed suit against Americare Systems, Inc., and Shelbyville Residential LLC, alleged to be the operator and owners of Celebration Way, together with Dottie Hunt, a licensed practical nurse, and Mary Ann Steelman, a registered nurse, who were involved in Ms. Farrar's care. The complaint sought both compensatory and punitive damages for the negligence of the defendants and the misrepresentations, referred to above, which were alleged to have resulted in Ms. Farrar's death.

¹The Residence and Service Agreement contained the following:

Arbitration of Disputes. It is understood that any dispute under this Agreement will be determined by submission to arbitration as provided by State law (as defined below), and not by a lawsuit or resort to court process except as State Law provides for judicial review of arbitration proceedings. Both parties to this Agreement, by entering into it, are giving up their constitutional right to have any such dispute decided in a court of law before a jury, and instead are accepting the use of arbitration.

On December 8, 2004, the defendants filed a motion to compel arbitration. Attached to this motion was an affidavit of Mary Ann Steelman identifying the two Residence and Service Agreements, the Acknowledgement and a limited power of attorney that appears to have been signed by Mable P. Farrar, dated March 2, 1993. This power of attorney was made a part of Ms. Farrar's file at the time of her admission to Celebration Way and appoints Ms. Wilson and Ms. Farrar's other daughter, Ms. Watson, as Ms. Farrar's agents and authorizes them to do a number of acts and things in her behalf. With regard to medical care, the power of attorney contains the following provision:

1. Medical Care. To contract for my entry into and maintenance in, or release from, any hospital, convalescent center, nursing home, or other type of health care center, including the authority to approve and give consent to any type of surgery or other medical treatment, should I at any time in the opinion of a licensed physician be incompetent or incapable of acting for myself.

The motion alleged that Residential and Service Agreements were signed pursuant to this power of attorney by Ms. Wilson as agent and attorney-in-fact for Ms. Farrar and that, as a result, the arbitration agreements were fully enforceable.

The plaintiff daughters filed a response to the motion to compel arbitration on January 5, 2005, alleging Americare Systems could not assert any rights to arbitration because it was not a party to the two Residence and Service Agreements. The response also alleged the arbitration provisions in the agreements were unenforceable because they were unconscionable and invalid. On January 28, 2005, the defendants voluntarily withdrew their motion to compel arbitration.

On December 19, 2007, the trial court entered an order setting the case for trial by jury on February 11, 2008. The order reflects the setting was "by agreement of the parties as communicated to the office of the undersigned judge in September, 2007, by the office of the Honorable C. J. Gideon."² Two days later, on December 21, 2007, the defendants filed a renewed motion to compel arbitration. The motion stated it was being renewed because of the then recent Tennessee Supreme Court decision in Owens v. National Health Corp., 263 S.W.3d 876 (Tenn. 2007).³ In response to the plaintiffs' opposition to the motion, the defendant attached another affidavit signed by Mary Ann Steelman. This affidavit contains the following:

I am presently Administrator of the assisted care facility in Shelbyville, Tennessee known as Celebration Way. Its official name is Shelbyville Residential, LLC. I was Administrator of the facility at all times that Mable Farrar was a resident of Celebration Way. Over a period of time before she became a resident, Farrar and her daughters discussed her possible residency for several days. Farrar and one of her daughters appeared at the facility in October 2003 to sign papers to become a resident

²Mr. Gideon is an attorney for the plaintiffs.

³The opinion was filed November 8, 2007.

at Celebration Way. I believe Mrs. Watson, the other daughter, was also present. Some of the time I spent with Mrs. Farrar, and some of the time Mrs. Wilson and I were alone. At all times, Mrs. Farrar acted as if Mrs. Wilson was her agent. I thought she was acting on Mrs. Farrar's behalf and with Mrs. Farrar's permission. Mrs. Wilson signed the actual contract to be executed for admission and at no time indicated that she was not the actual agent of Mrs. Farrar. Mrs. Farrar never indicated that her daughter was not authorized to act in her behalf and, in fact, allowed her daughter to sign many of the documents in Mrs. Farrar's name. At all times, Celebration Way honored the contract between Mrs. Farrar (signed by Mrs. Wilson) and Celebration Way. In fact, Mrs. Wilson signed all checks and paid all bills on behalf of her mother, Mrs. Farrar. All medication bills sent to Celebration Way were mailed to and paid by Mrs. Wilson. At no time during Mrs. Farrar's life as a resident at Celebration Way did she or her daughter say or even indicate that they felt that any original document, including the ones containing the arbitration agreement, which Mrs. Wilson signed for Mrs. Farrar, did not bind Mrs. Farrar. Mrs. Farrar allowed her daughter to execute two documents containing an arbitration agreement. . . .

The plaintiffs filed copies of Ms. Farrar's medical records indicating Ms. Farrar was alert, oriented and quick to comprehend on October 14, 2003, the date following her admission to Celebration Way, and on January 10, 2004, nine days after the second Residence and Service Agreement was signed by Ms. Wilson. While the trial court briefs refer to a deposition of Dr. Deborah Robin relative to Ms. Farrar's mental capacity, that deposition does not appear in the record before this court. There is no evidence in the record that Ms. Farrar was examined by a licensed physician at any time around or after her admission to Celebration Way and found to be incompetent.

The trial court denied the defendants' renewed motion to compel arbitration. In so doing the trial court stated in its order:

As to the basis for an order to compel arbitration argued by the Defendants, the Defendant failed to make a showing of facts sufficient to be a basis for the granting of the relief sought even in the absence of a waiver. . . .

The Court further finds that the parties have already exchanged written discovery, eleven (11) depositions have been taken in total, with ten (10) having taken place prior to the filing of this Motion, and the remaining deposition still having been taken prior to this Motion being heard. The Court finds that the Defendants' asserted right to compel arbitration was waived under these circumstances.

The defendants have appealed alleging the trial court erred in finding they had waived the arbitration requirements contained in the Residence and Service Agreements and in finding that they had failed to make a showing of facts sufficient to entitle them to the relief sought.

STANDARD OF REVIEW

This court reviews the denial of a motion to compel arbitration under the same standards applicable to bench trials. Cabany v. Mayfield Rehab. & Special Care Ctr., No. M2006-00594-COA-R3-CV, 2007 Tenn. App. LEXIS 696, 2007 WL 3445550, *3 (Tenn. Ct. App. Jan. 9, 2007); Spann v. Am. Express Travel Related Servs. Co., Inc., 224 S.W.3d 698, 706 (Tenn. Ct. App. 2006) (perm. app. denied Jan. 29, 2007). The trial court's findings of fact are reviewed “de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.” Tenn. R. App. P. 13(d). If the trial court has not made a specific finding of fact on a particular matter, we will review the record to determine where the preponderance of the evidence lies without employing a presumption of correctness. Reagan v. Kindred Healthcare Operating, Inc., No. M2006-02191-COA-R3-CV, 2007 Tenn. App. LEXIS 798, 2007 WL 4523092, *8 (Tenn. Ct. App. Dec. 20, 2007); Hardcastle v. Harris, 170 S.W.3d 67, 78-79 (Tenn. Ct. App. 2004).

ANALYSIS

The only evidence contained in the record that was presented to the trial court relative to the renewed motion to compel arbitration was the two affidavits of Mary Ann Steelman and the records of Celebration Way indicating the results of the monthly assessments of Ms. Farrar. Based upon this meager evidence, we are in agreement with the trial court that the defendants failed to make a showing of facts sufficient to entitle them to the relief sought. Because the defendants failed to prove a valid arbitration agreement, the judgment of the trial court denying the renewed motion to compel is affirmed. Finding insufficient evidentiary support for a finding that defendants had waived their rights under the arbitration agreement, we vacate that portion of the trial court's order and remand the case for an evidentiary hearing should the issue of waiver again become relevant.

Sufficiency of the Evidence

In a contest over an arbitration agreement, a trial court has to decide certain “gateway matters,” such as whether the parties have a valid arbitration agreement at all. Raines v. National Health Corp., M2006-1280-COA-R3-CV, 2007 WL 4322063, at *3 (Tenn. Ct. App. Dec. 6, 2007). In our view, the existence of a valid arbitration agreement in the case before us is dependent upon whether Ms. Wilson had the authority to sign the agreement in behalf of her mother.

In order to bind Ms. Farrar to the arbitration agreement, Ms. Wilson had to have authority to act as her agent or surrogate. See Tenn. Code Ann. 68-11-1806(a); McKey v. Nat'l Healthcare Corp., No. M2007-02341-COA-R3-CV, 2008 WL 3833714 at *2 (Tenn. Ct. App. Aug. 15, 2008); Thornton v. Allenbrooke Nursing & Rehab. Ctr., LLC, No. W2007-00950-COA-R3-CV, 2008 WL 2687697, *5-7 (Tenn. Ct. App. July 3, 2008); Raiteri ex rel Cox. v. NHC Healthcare/Knoxville, Inc., No. E2003-00068-COA-R9-CV, 2003 WL 23094413, *9 (Tenn. Ct. App. Dec. 30, 2003). The power of attorney executed by Ms. Farrar authorized Ms. Wilson to make medical decisions for Ms. Farrar but specifically conditioned that authority on the opinion of a licensed

physician that she was incompetent or incapable of acting for herself. There simply is no evidence in this record that Ms. Farrar was either incompetent or incapable of acting for herself. See Hendrix v. LifeCare Ctrs. of Am., Inc., No. E2006-02288-COA-R3-CV, 2007 Tenn. App. LEXIS 791, 2007 WL 4532876, at * 14 (Tenn. Ct. App. Dec. 21, 2007) (no perm. app. filed) (holding that durable power of attorney was not effective at time of mother's admission because mother was still able to make her own medical decisions at the time of admission, thus, daughter's waiving of mother's right to jury trial was unenforceable).

The Tennessee Health Care Decisions Act allows an adult or emancipated minor to designate a surrogate to make health care decisions for him or her. Tenn. Code Ann. § 68-11-1806(a). That designation may be oral or written. Id. Again, there is no evidence in the record before us that Ms. Farrar made either an oral or written designation of Ms. Wilson as her surrogate. Moreover, a person designated as a surrogate may make health care decisions "on behalf of an adult or emancipated minor, if, and only if: (1) The patient has been determined by the designated physician to lack capacity; and (2) No agent or guardian has been appointed or the agent or guardian is not reasonably available." Tenn. Code Ann. § 68-11-1806(b).

During the hearing of the renewed motion to compel arbitration, defendants argued Ms. Wilson had the apparent authority to sign the Residence and Service Agreements on behalf of Ms. Farrar. Absent an overt affirmation of agency, our courts have held that the authority to contract for medical services cannot be premised upon apparent authority. Thornton, 2008 WL 2687697, at *7 ; Raiteri, 2003 WL 23094413, at *9. The cases are consistent in "finding no authority if the principal did not exhibit some sort of act to convey the authority." Thornton, 2008 WL 2687697, at *7. There is no evidence in the record before us that Ms. Farrar was present when Ms. Wilson signed the Residence and Service Agreement.⁴ There is no evidence she exhibited any sort of act to convey the authority to Ms. Wilson to sign the agreement in her behalf. It follows that defendants failed to establish Ms. Wilson had the authority to sign the Residence and Service Agreements for Ms. Farrar. Thus, we hold the record fails to establish there was a valid arbitration agreement for the trial court to enforce.

Waiver

Both in the trial court and on this appeal, the primary issue raised by the parties was whether the defendants, by withdrawing their motion to compel arbitration and participating in the litigation for more than three years, waived of the alleged arbitration agreement. Waiver is the voluntary relinquishment or renunciation of some right, the foregoing or giving up of some benefit or advantage, which, but for such waiver, the party would have enjoyed. Stovall of Chattanooga v. Cunningham, 890 S.W.2d 442, 444, (Tenn. Ct. App. 1994). It may be proved by express declaration; by acts and declarations manifesting an intent and purpose not to claim the supposed advantage; or by so neglecting and failing to act as to induce a belief that it was the party's intention and purpose

⁴There is an indication in the argument of defendants' attorney that the second Residence and Service Agreement was mailed to Ms. Wilson for her signature.

to waive the benefit or advantage. Id. In order to constitute a waiver, the acts or course of conduct relied upon must be clear, unequivocal and decisive acts of the party or an act which shows a determination not to have the benefit. Id.

The Tennessee Supreme Court has recognized the general legislative and judicial policies of favoring the enforcement of agreements to arbitrate. Buraczynski v. Eyring, 919 S.W.2d 314, 317 (Tenn. 1996). Consistent with public policy in favor of arbitration, there is a generally recognized presumption against waiver. J. Wise Smith and Associates, Inc. v. Nationwide Mut. Ins. Co., 925 F. Supp. 528, 530-531 (W.D. Tenn. 2003), Chapman v. H&R Block Mortgage Corp. E2005-0082-COA-R3-CV, 2005 WL 3159774, at *12 (Tenn. Ct. App. Nov. 28, 2005). A party seeking to prove waiver of an agreement to arbitrate bears a heavy burden. Chapman, 2005 WL 3159774, at * 12. Because waiver of the right to arbitration is disfavored, the plaintiffs bear a heavy burden of proof in establishing such a waiver. Id. In order to prevail on this point, the plaintiffs must show that the defendants knew of their right to arbitrate, acted inconsistently with that right, and, in doing so, prejudiced the plaintiffs by their actions. Id.

Because the record with regard to the issue of waiver is incomplete, we are unable to decide that issue. The record indicates that on December 8, 2004, the defendants filed a motion to compel arbitration and on January 28, 2005, the defendants voluntarily withdrew their motion. It also appears that on December 21, 2007, the defendants filed a renewed motion to compel arbitration. These filings were essentially the only evidence before the court relating to the waiver issue.

After the withdrawal of the original motion to compel arbitration, there appears a recitation in an order that, based upon the representation of counsel for defendants, the parties had agreed to set the case before a jury. Certainly, withdrawal of the motion to compel arbitration coupled with an agreement to set the case before a jury could be viewed as clear and unequivocal relinquishment of the right to arbitrate. There is a suggestion in the arguments before the court that the case had been set by agreement on more than one occasion. The only evidence in the record supporting the trial court's finding that "the parties have already exchanged written discovery, eleven (11) depositions have been taken in total, with ten (10) having taken place prior to the filing of this Motion" appears in the arguments of counsel.⁵ Counsel for the defendants argued before the trial court that those depositions would have had to be taken even if the case had gone to arbitration. Counsel for the plaintiffs countered with the representation to the trial court that when a case goes to arbitration, the parties receive instructions limiting the amount of discovery that can be taken. No facts supporting these contentions were presented to the trial court in evidentiary form. Statements and arguments of counsel made during the course of a hearing are not evidence. Metro. Gov't of Nashville & Davidson County v. Shacklett, 554 S.W.2d 601, 605 (Tenn. 1977); Oakes v. Oakes, 235 S.W.3d 152, 158 (Tenn. Ct. App. 2007).

⁵ While there appeared to be no disagreement between counsel with regard to the number of depositions that had been taken, there was no stipulation as to this fact.

There was also a suggestion made during the hearing before the trial court that the court had granted a partial summary judgment to the plaintiffs relative to the issue of the defendants' negligence. That order is not contained in the record but obviously would be relevant to the issue of prejudice that would now be caused by compelling arbitration.

Essentially, the only evidence in the record relating to the waiver issue is the passage of time between withdrawal of the original motion to compel arbitration and the filing of the renewed motion to compel arbitration. Because we are unwilling to base a finding of waiver on the mere passage of time, we vacate the portion of the trial court's order finding waiver of the alleged arbitration agreement and remand the case to the trial court for an evidentiary hearing should this issue become relevant to the proceedings.

CONCLUSION

The judgment of the trial court denying defendants' renewed motion to compel is affirmed and the cause is remanded for further proceedings. The portion of the trial court's order finding a waiver of the alleged arbitration agreement is vacated and the cause remanded for an evidentiary hearing should that issue again become relevant. The costs of this appeal be taxed to Shelbyville Residential, LLC, and Americare Systems, Inc.

DONALD P. HARRIS, SENIOR JUDGE